IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]69

RONALD L. FREEDMAN,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the Court of Appeals of Maryland, entered on February 10, 1964, affirming a judgment of the Baltimore Court convicting appellant of violating Article 66A of the Maryland Code and imposing a $25.00 fine upon him. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below

The opinion of Judge Anselm Sodaro of the Criminal Court of Baltimore is not reported. A copy of that opinion is annexed hereto as Appendix B, *infra,*

p. App. 15. The opinion of the Court of Appeals of Maryland is reported in 197 A.2d 232. A copy of that opinion is annexed hereto as Appendix C, *infra*; p. App. 18.

Jurisdiction

The final judgment of the Court of Appeals of Maryland was entered February 10, 1964. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2), the courts below, in finding appellant guilty of violating Article 66A of the Maryland Code and in affirming the judgment of conviction, having rejected appellant's timely claims that said state statute is invalid on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States. The following decisions sustain the jurisdiction of this Court: *Lovell* v. *Griffin*, 303 U.S. 444; *Niemotko* v. *Maryland*, 340 U.S. 268; *Staub* v. *City of Baxley*, 355 U.S. 313.

The Notice of Appeal was filed in the Criminal Court of Baltimore on May 1, 1964

Questions Presented

The state of Maryland has imposed criminal penalties on appellant because he publicly exhibited what the State acknowledged to be an entirely permissible motion picture without purchasing the State's prior approval of the concededly permissible motion picture through submission of the motion picture to the Maryland Motion Picture Censor Board:

1. Has not Maryland, in imposing criminal penalties on the very act of free expression of concededly legitimate matter, directly transgressed the First and Fourteenth Amendments?

2. In seeking to use its criminal processes to coerce appellant:

(A) to purchase from the State the privilege of publicly exhibiting a concededly permissible motion picture, was not Maryland seeking to impose a tax on appellant's exercise of his constitutional right of free expression in contravention of the First and Fourteenth Amendments?

(B) to submit a concededly permissible motion picture to the Motion Picture Censor Board for approval which, the State acknowledges, that Board could not have lawfully withheld, was not Maryland seeking to delay appellant in the immediate exercise of his present right of free expression in contravention of the First and Fourteenth Amendments?

Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question is Article 66A of the Maryland Code.[1] Sections 2, 6, and 11 of which are as follows:

ACT OF 1922, CHAPTER 390

Article 66A, Annotated Code of Maryland (1960 Ed).

2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner

[1] The statute is set forth in full, Appendix A, p. 1, infra.

or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this Article called the Board.

6. (a) The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) For the purposes of this Article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) For the purposes of this Article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) For the purposes of this Article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

11. For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of Three Dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of Four Dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of One Dollar ($1.00) for the approval of every duplicate of one thousand feet (1,000′) or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of Two Dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of Two Dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of One Dollar ($1.00) for each on hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee

of One Dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of Section 7 of this Article; and the Board shall account for and pay all fees received by it into the State Treasury.

2. The constitutional provision to which, in appellant's view, the foregoing statutory provisions are repugnant, is Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Statement

Appellant manages the Rex Theatre, in Baltimore. E. 39.[2] On November 1, 1962, appellant telephoned Mrs. Eva Holland, an employee of the Maryland Motion Picture Censor Board, advising her of his intention to exhibit, at the Rex Theatre in the regular course of business, a film—"Revenge at Daybreak" —which had not been submitted to the Board for censorship. E. 31. Mrs. Holland appeared at appellant's theatre that evening and saw "the film exhibited in its entirety." E. 31-32. And thereupon, on instruction of the Chairman of the Board, Mrs. Holland secured a warrant for appellant's arrest, which was served on appellant by a Baltimore policeman. E. 37.

Following indictment, appellant was tried in the Baltimore Criminal Court, on March 18, 1963, for the alleged violation of Article 66A of the Maryland Code, which makes it "unlawful to . . . exhibit . . .

[2] All references to "E" pages in this Jurisdictional Statement are to the Appendix to Appellant's Brief filed in the Court of Appeals of Maryland.

any motion picture film in the State of Maryland unless the said film has been submitted by the . . . lessee of the film . . . and duly approved and licensed by the . . . [Motion Picture Censor] Board."

In his opening statement counsel for appellant advised Judge Sodaro that "the State purports to have the right under this act [Article 66A] to restrain the right of Mr. Freedman to exercise his Constitutional freedoms of speech and press. It is the belief of Mr. Freedman and myself that the Censorship Act is an oppressive act that is unconstitutional under both the Federal and State Constitutions . . ." E. 29.

The State proved, through Mrs. Holland, that appellant had exhibited "Revenge at Daybreak" without submitting it for censorship. E. 31-32. Appellant was not permitted to examine Mrs. Holland on whether the film satisfied the statutory censorship standards, but appellant offered to prove, that had she been permitted to answer, Mrs. Holland would have acknowledged "that the film did not violate any of the standards set forth in this Act." E. 36.

Appellant, by calling members of the Motion Picture Censor Board, showed the way in which the Board administers the statutory censorship standards.[3]

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[3] For example, appellant's counsel examined Norman Mason, a member of the Board, on the way in which the Board has administered Section 6(c), which is almost verbatim the same as the section of the New York statute involved in *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, in which the New York ban on the film of "Lady Chatterly's Lover" was set aside (E. 56-57):

> Q. You know it involved the same standard, Mr. Mason, having knowledge of the fact that these standards have been knocked out by the United States Supreme Court, have you

Appellant testified that in submitting an average film for censorship, one has to pay a fee of, on the average, some $30. E. 40. Appellant also showed, through the Board's annual reports, that over the course of the Board's existence the fees it has collected have exceeded administrative costs by over a half million dollars, which excess has gone to the Maryland Treasury. E. 28. The prosecutor advised Judge Sodaro that Maryland did not contend that the Motion Picture Censor Board would not have approved "Revenge at Daybreak" had it been submitted. E. 43. At appellant's request, Judge Sodaro himself viewed the film (E. 44), and the film is part of the record in this case (E. 31).

At the close of all the testimony, appellant moved for a judgment of acquittal on the grounds, *inter alia*, that Article 66A of the Maryland Code

> . . . violates the First and Fourteenth Amendments of the United States Constitution in that

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still continued to employ the use of these same standards in the censoring of films? A. Sir——

(T. 25) (Mr. Freeze) Objection.

(The Court) Well, let him answer. Let him answer.

(Witness) Sir, each picture is altogether different. It depends upon the circumstances why certain scenes would be allowed in a picture; and, maybe other circumstances possibly it would not be. I mean, each picture has to go on its own. I mean, in other words, you can't very well take one picture and it has been a guide only to a certain degree.

(Question read.)

Q. (Mr. Bilgrey) Is your answer yes? A. No, it isn't yes. Each picture has to stand on its own merits, I mean, rarely do you see two pictures, in fact, I have never seen two pictures identically alike; and, certain parts of a picture tends to make it altogether different than other parts in the picture.

Q. I would still like to get an answer yes or no.

(The Court) Well, the answer to the question (T. 26) is,

said Article imposes an invalid infringement upon the exercise of the right of free speech and press . . .

. . . is invalid as contrary to the Due Process Clause of the Fourteenth Amendment in that the standards pursuant to which speech is abridged set forth in, more specifically, Section 6 of said Article, are vague and in that these standards fail to advise defendant of those forms of speech which the state purportedly proscribes . . .

. . . is so vague and indefinite in form that it can be interpreted as to permit within the scope of its language the banning of incidents fairly within the protection or guarantee of freedom of speech and press and is therefore void as contrary to the Fourteenth Amendment of the United States Constitution and as contrary to the terms of the Maryland Constitution . . .

Mr. Mason, as I understand it, knowing these standards have been knocked out by the Supreme Court, do you still use those same standards?

(Witness) No.

(The Court) The answer is no.

Q. (Mr. Bilgrey) What standards do you use if you do not use the standards that are contained in Section 6? What standards do you use, that is what we are trying to find out. A. With each picture depends solely on itself. No way to make a general answer of that particular question.

Q. You use different standards, then, in connection with your judging of every individual film? A. Any portion of any picture that the Supreme Court has ruled on we try to go by the Supreme Court ruling. I mean, we don't try to overpower those boys, is that what you mean?

Another member of the Board, Mrs. Louise E. Shecter, answered as follows (E. 73):

Q. (Mr. Whiteford) Miss Shecter, could you apply discretionary standards as a censor? A. That is right.

> . . . is invalid in that it imposes a tax and/or a license fee upon the right of the freedoms of speech and press and is thus contrary to the First and Fourteenth Amendments of the United States Constitution. . . .

On May 24, 1963, Judge Sodaro filed a memorandum opinion (E. 76) overruling appellant's federal claims and denying his motion for acquittal. Thereupon Judge Sodaro entered a judgment of conviction and fined appellant $25. (E. 1.)

Appellant, repeating his federal claims, appealed the judgment of conviction to the Maryland Court of Appeals. On February 10, 1964, the Court of Appeals affirmed the judgment of conviction. 197 Atl. 2d 232. Although expressly noting that the State conceded that "Revenge at Daybreak" would have been approved had it been submitted for censorship, the Court of Appeals concluded—as had Judge Sodaro below—that the decision in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, ruled the case adversely to appellant's federal claims.

The Federal Questions are Substantial

The Criminal Court of Baltimore, rejecting defenses predicated on the First and Fourteenth Amendments to the Constitution, found appellant guilty of violating Article 66A, § 2, of the Maryland Code, and this judgment of criminal guilt was upheld by the Maryland Court of Appeals. Appellant submits that the judgment and opinion of the Court of Appeals determined certain substantial federal ques-

tions, which had been duly tendered to that court, in a way which is in probable conflict with applicable decisions of this Court:

I.

The Maryland Court of Appeals held, erroneously, that the present case was controlled by *Times Film Corp.* v. *Chicago*, 365 U.S. 43. This holding led the Court of Appeals into the further error of affirming a criminal conviction imposed on appellant for exercising his right under the First and Fourteenth Amendment to exhibit a concededly permissible film.

A. The instant case is not controlled by *Times Film Corp.* v. *Chicago*

The Maryland Court of Appeals agreed with the Criminal Court of Baltimore that appellant's federal claims were governed, adversely to appellant, by this Court's decision in *Times Film Corp.* v. *Chicago, supra.* Appellant submits that in sustaining his conviction "on the authority of the *Times Film* case," (Appendix C, p. App. 24, *infra;* 197 A. 2d, at 235), the Court of Appeals failed to recognize that *Times Film* and the instant prosecution are vastly different—constitutionally different—cases.

Times Film was a civil action in equity initiated by a motion picture distributor seeking to challenge Chicago's system of municipal censorship of motion pictures. Plaintiff had tendered to the censorship officials the required license fee, but had declined to submit for censorship the film ("Don Juan") which plaintiff sought to exhibit. When the censorship

officials refused to issue a permit authorizing plaintiff to exhibit the film, plaintiff sought a federal court order compelling issuance of the permit, or, in the alternative, enjoining enforcement of so much of the municipal code as prohibited exhibition of a film without permission of the censoring officials. Plaintiff's position was that it was entitled to exhibit the film in question, whatever its content, subject only to subsequent criminal prosecution under Illinois' laws against pornography. The federal district court and the federal court of appeals concluded that the case posed no justiciable issue. This Court, on certiorari, found that there was a justiciable issue, and addressed itself to the merits. And this Court carefully delineated the issue before it (365 U.S. at 46):

> Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone we decide.

Having so delineated the issue, this Court resolved it adversely to plaintiff (365 U.S. 46, 47):

> . . . [T]here is not a word in the record as to the nature and content of "Don Juan." We are left entirely in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. . . .

> Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, § 470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment. . . . Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree.

The instant case comes before this Court in an entirely different posture, and presents issues of very different dimension. In the instant case, the moving party is the state, which seeks to sustain a criminal judgment against appellant. In the instant case, appellant does not claim—as petitioner claimed in *Times Film*—"complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" 365 U.S. at 46.[4] In the instant case it cannot be said, as

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[4] That this Court's statement of the issue in *Times Film* accurately reflects the position asserted by petitioner before this Court is evident from the following colloquies which took place on the oral argument on *Times Film*:

> Justice Harlan: What you are saying, I gather, is that on the assumption this film which we haven't got is the hardest sort of hard core pornography, that the State of Illinois cannot deal with you through a licensing program, but that it has got to let you exhibit and then prosecute you if you violate the criminal law; is that it?
>
> Mr. Bilgrey: Mr. Justice Harlan, if I may be permitted to

this Court properly said in *Times Film,* that "there is not a word in the record as to the nature and content" of the film sought to be exhibited, or that the members of this Court "are left entirely in the dark in this regard, as were the city officials and other reviewing courts." 365 U.S. at 46, 47. In the instant

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expand on that, we are saying that to a certain degree that we are not suggesting what remedies the state can have.

Justice Harlan: Isn't that your whole case? Isn't that what you are here about?

Mr. Bilgrey: Well, I believe that that is a correct statement, Mr. Justice Harlan. . . . (Transcript of oral argument, pp. 11-12.)

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Justice Frankfurter: I am not suggesting any presumption regarding this particular undisclosed film. What I am suggesting is a legal proposition, if I follow your argument at all, that for purposes of the question before the Court, it is a matter of indifference what the character or quality or message or whatever you may say about a film, it is a matter of indifference.

It may be at once the most notable and noble picture, or it may be the vilest of pictures. From the point of view of the question before the Court, that is a matter of indifference.

Mr. Bilgrey: I think it is. I think that is correctly stated, Mr. Justice Frankfurter.

Justice Frankfurter: Very well. (Transcript of oral argument, p. 25)

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Justice Whittaker: I am asking you—I am not hypothetical: I am on concrete cases here.

I am asking you if by this very suit you are not asking the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No; and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. . . . (Transcript of oral argument, p. 86)

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See also pp. 5, 6, and 8 of the transcript of oral argument.

case, the film in question has been exhibited, (E. 44), is in the record, (E. 31), and has been viewed by the trial court. (E. 44.) Moreover—and this alone decisively differentiates this case from *Times Film*—in the instant case, as the Court of Appeals itself observed, the State of Maryland acknowledged that the film in question "*would have been approved had it been submitted for licensing.*" Appendix C, p. 20, *infra;* 197 A.2d, at 234 (emphasis added).

In short, in the instant case the State of Maryland has visited criminal punishment on one whose sole act has been to exhibit a film which, *as the state concedes,* the state was without legal power to proscribe. Thus the very issue tendered and decided in *Times Film*—"whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" (365 U.S. at 46)[5] is absent here. Here the State of Maryland seeks to punish appellant for exhibiting a motion picture which the state has conceded to be unobjectionable.

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[5] Subject only to "the invocation of criminal process under the . . . pornography statute . . . and then only after a transgression." 365 U.S. at 49. This Court has since reiterated the limited nature of the *Times Film* decision: "The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.*" *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 n. 10 (emphasis by this Court).

B. To impose criminal penalties on appellant for exhibiting a concededly proper film directly infringes upon his rights under the First and Fourteenth Amendment.

The asserted justification for the limited prior restraint in *Times Film* was the special character of the motion picture medium. This special character did not serve to take motion pictures outside the ambit of constitutional rights of free expression, but it was said to support a system of restraint which has, in American constitutional jurisprudence, no approved analogue in the regulation of speech and the press. 365 U.S. at 49-50; cf. *Burstyn* v. *Wilson*, 343 U.S. 495, 502-03, 504-05. Nor could motion pictures be so restrained if disseminated via the airwaves, *Allen B. Dumont Labs* v. *Carroll*, 184 F. 2d 153 (C.A. 3, 1950), cert den. 340 U.S. 929.

Appellant, with all deference, views this Court's holding in *Times Film* as inharmonious with this Court's other holdings with respect to questions of prior restraint. As this Court held in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

If *Times Film* were overturned, as appellant believes it should be, appellant's conviction would of course be set aside. Yet, as indicated above, appellant submits that even if *Times Film* survives undisturbed, the Court's holding in that case—since characterized by this Court as a refusal to find that "a prior re-

straint was necessarily *unconstitutional under all circumstances," Bantam Books,* supra, at 70, n. 10—does not support a criminal conviction for exhibiting a motion picture under the *acknowledged circumstance* that the motion picture is unobjectionable. cf. *Smith* v. *California*, 361 U.S. 147—in which *Burstyn* is cited with approval—at 152:

> "But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene;"

It remains to show that to impose criminal penalties for exhibiting a concededly legitimate motion picture is unconstitutional.

Once it is granted that, as this Court has many times held, the exhibition of non-obscene motion pictures is within the ambit of the First and Fourteenth Amendments (see, *e.g., Burstyn* v. *Wilson, supra; Kingsley Pictures Corp.* v. *Regents,* 360 U.S. 684; *Smith* v. *California, supra;* and *Times Film* itself), it would hardly seem open to argument that a state cannot make criminal the act of exercising the acknowledged constitutional right.

Nor does the state's case draw strength from an attempt to define the offense charged in a different way—as by arguing that appellant's crime lay in exhibiting "Revenge at Daybreak" without submitting the film to the Maryland Motion Picture Censor Board for that Board's prior approval of the proposed showing. For here, to repeat, appellant's film is conceded to be one which the Board could not have lawfully denied appellant the right to exhibit. And

so the state is, presumably, remitted to contending that it was entitled to require the footless act of prior submission—with its attendant costs to appellant in fees, and in delay (see *infra*, Point II)—merely as a way of assuring that other films, the content of which is unknown, would continue to be funneled through the Motion Picture Censor Board in the manner contemplated by Article 66A, § 2, of the Maryland Code.

But the argument will not wash. It fails, as a comparable argument failed, in the face of claims of personal liberty on a par with the rights protected by the First Amendment, in *Ex Parte Endo,* 323 U.S. 283. There, it will be recalled, the United States sought to resist the release from a World War II relocation center of an American citizen of Japanese ancestry whose loyalty the government conceded. Miss Endo could not be released, in the government's view, until a program for her planned relocation in an approved area of the country had been arrived at: "The success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation. . . ." 323 U.S., at 297. But this Court held that Miss Endo was entitled to immediate release (323 U.S., at 302):

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort

against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded.

In the instant case, even if we assume (as appellant does, for purposes of argument, though he would also challenge the assumption) that the claimed authority to exclude certain films in advance is justified, the authority is exhausted when the legitimacy of the film sought to be exhibited is conceded. To hold otherwise—to permit appellant's conviction to stand—would be to accord appellant the curious honor of being the first American in the nation's history who was branded a criminal for exercising rights conceded to be indubitably his under the First Amendment.

II.

In seeking to channel appellant into submitting "Revenge at Daybreak," a concededly legitimate film, to a censorship process costly to appellant both in dollars and in time, the State of Maryland was seeking to impose on appellant a dual infringement of his constitutional right to untrammeled and immediate public exhibition of his film.

A. The cost to appellant in dollars.

If appellant had submitted "Revenge at Daybreak," the film he proposed to exhibit, to the Maryland Motion Picture Censor Board, the fee demanded of him would have been on the order of thirty dollars. (E. 40.) The cost to appellant is not the total cost: Fees would be exacted for each supplemental print of "Revenge at Daybreak".[6]

Assuming the continued vitality of *Times Film,* it is certainly arguable that the state can exact a license fee approximately commensurate with the administrative cost of maintaining a valid system of prior censorship.[7] But such an argument, whatever its intrinsic validity, is beside the point presented by appellant's case. For the doctrine of *Times Film* is

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[6] During the fiscal year 1962, the Board processed and collected fees on 653 original films, 526 re-issue films, and on 5,504 duplicate prints. (E. 23)

[7] But it bears remembering that in *Times Film* the validity of the license fee was not at issue; petitioner, having tendered the demanded fee, but not the film, had taken the question of the fee out of the case.

meaningful only as to films with respect to whose content the censoring "officials and the . . . reviewing courts" are "entirely in the dark." 365 U.S., at 46-7. In the present case, appellant proposed to exhibit a film conceded to be unobjectionable.

Viewed in this posture, it is evident that what Maryland sought to do—through the *in terrorem* impact of its criminal process, waiting in the wings—was to coerce appellant into payment of a fee to subsidize a state administrative procedure which was, *as to appellant*, constitutionally unjustifiable.

The thirty dollars which would have been exacted of appellant, had he submitted his film, would have been an inspection fee taken from him at the toll gate before he could travel the highway beyond. But, in appellant's case, it is conceded that appellant's vehicle—"Revenge at Daybreak"—was, constitutionally speaking, without blemish. Wherefore, appellant was entitled to travel the highway without charge. No other conclusion can be squared with this Court's unbroken line of cases striking down taxes on the exercise of First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Jones* v. *Opelika*, 319 U.S. 103; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Follett* v. *McCormick*, 321 U.S. 573.

Needless to add, this conclusion is not altered by the fact that a payment of only thirty dollars (together with submission of the film) would have saved appellant the criminal penalties now sought to be visited upon him. In *Follett*, the daily license cost but a dollar; and an entire year's license could have been had for fifteen dollars. Indeed, as Madison in-

sisted in his memorable Remonstrance against money exactions to support religion, "it is proper to take alarm at the first experiment on our liberties. . . . The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever." See *Everson* v. *Board of Education,* 330 U.S. 1, 33, n. 29 (dissenting opinion). The First Amendment knows no rule of *de minimis.*[8]

B. The cost to appellant in time.

Rights of free expression, like rights to the equal protection of the laws, are "personal and present." *McLaurin* v. *Oklahoma,* 339 U.S. 639. To delay rights of free expression, as to delay the claims of justice, is to deny them. Cf. *Staub* v. *City of Baxley, supra; Niemotko* v. *Maryland,* 340 U.S. 268; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State,* 308 U.S. 147; *Lovell* v. *Griffin, supra.*

Had appellant submitted "Revenge at Daybreak," a concededly permissible motion picture, to the Motion Picture Censor Board, that Board would, under Rule 4 of its Rules, have consumed between two and three days in reaching the fore-ordained conclusion that appellant was constitutionally entitled to exhibit the motion picture to the public. (E. 4.)

Two-to-three days of delay in exhibiting a motion picture may be a tolerable burden where it serves

[8] Were it otherwise, it could be argued that the fact that, in the instant case, appellant was only fined twenty-five dollars would deprive him of standing to appeal to this Court.

some arguably valid state purpose—where, for example, two or three days must be consumed in pursuing censorship procedures whose validity is supported by this Court's holding in *Times Film*. But where, as here, it is manifest that with respect to a particular motion picture no review procedure is needed, or can constitutionally be imposed, then *any* significant delay—like *any* monetary exaction—becomes an unconstitutional obstacle to the exercise of First Amendment rights.

The more so is this true when it is recognized that the two-to-three days required by the Motion Picture Censor Board presumes that the Board will recognize the innocence of each unobjectionable film it processes. The actual fact is to the contrary. Because the Motion Picture Censor Board is a board of censorship, it tends to censor. And it tends to censor films which are, in the perspective of the law, beyond its reach. But before the law catches up with the Board—as the Maryland Court of Appeals did, for example, in *State Board of Motion Picture Censors* v. *Times Film*, 212 Md. 454, 129 A.2d 833; *United Artists* v. *Maryland State Board of Censors*, 210 Md. 586, 124 A.2d 292; and *Fanfare Films, Inc.* v. *Motion Picture Censor Board*, 197 A.2d 839, not days but years go by in which an exhibitor's constitutional rights have been irretrievably lost. And of course one of the reasons this is true is because the statutory standards within which the Maryland Motion Picture Censor Board operates are so capricious as to invite maximum intervention by the censoring officials. Yet the Court of Appeals of Maryland declined, in the instant case, to let appellant challenge the statutory standards. Cf.

Thornhill v. *Alabama*, 310 U.S. 88 (cited with approval in *Bantam Books supra*, at 66) at 97, 98:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . *One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it.* (emphasis added)

One can avert one's gaze from the standards fashioned for the Maryland Motion Picture Censor Board by the Maryland Legislature. But one cannot blink at the impact of lengthy censorship proceedings on those who propose publicly to exhibit a film which, concededly, no American government official can constitutionally interfere with.

In this case Maryland sought to use its criminal process as a device to compel appellant to undergo the concededly useless process of censorship—a process which could subserve only the ends of augmenting state revenues[9] and delaying appellant in the free exercise of his constitutional rights. Maryland sought, through the threat of criminal prosecution, to compel appellant to submit his film to censorship. Appellant would not submit, and therefore he was prosecuted. His conviction cannot coexist with the First and Fourteenth Amendments.

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[9] Had appellant's film been held objectionable by the Board, he would also have had to incur substantial added costs in appellate litigation—as, of course, he has had to on appeal from the instant conviction.

Conclusion

Professor Bickel, writing after *Times Film,* has put his finger on the issues not reached by that case (BICKEL, THE LEAST DANGEROUS BRANCH, pp. 137-38):

> The most crucial present-day difference between prior restraints and subsequent punishments concern what happens to the film while litigation takes its course. If it were necessarily true that a film may be exhibited—at the defendant's peril, to be sure, but nevertheless exhibited—throughout the period of criminal litigation and appellate judgment, while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. Mr. Freund, for example, has strongly urged that the act of disobeying the censor and showing the film without a license should be held not to be a punishable offense if the exhibitor wins the ultimate litigation. This suggestion would equalize matters.

The view espoused by Professor Freund,[10] and endorsed by Professor Bickel, should entail the corollary view that one who declines to submit to censorship should also prevail if, in the resultant criminal prosecution, the state cannot demonstrate the impropriety

[10] Professor Freund's thesis is stated in *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 538-39 (1951), an article cited with approval by this Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See also Professor Emerson's study, *The Doctrine of Prior Restraint*, in 20 LAW & CONTEMP. PROB. 648.

of the exhibited motion picture. But, however that may be, it must entail that corollary where, as in the instant case, the state not only does not claim impropriety but *concedes the contrary.* To acknowledge appellant's constitutional right of free expression and to stamp him a criminal for exercising that right would take us back to a never-never land of jurisprudence unimagined even by the great author of *Areopagitica.*

Wherefore, it is respectfully urged that probable jurisdiction be noted and that the judgment below be reversed.

Respectfully submitted,

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Appendix A

ACT OF 1922, CHAPTER 390

(As amended by the Acts of the General Assembly of Maryland of 1927, 1929, 1939, 1941, 1945, 1947, 1955 and 1960.)

1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, 1; 1939, 1; 1924, 1; 1922, ch. 390, 1; 1941, ch. 28.)

2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, 2; 1939, 2; 1924, 2; 1922, ch. 390, 2.)

3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective terms to be designated by the Governor. (An. Code, 1951, 3; 1939, 3; 1924, 3; 1922, ch. 390, 3; 1939, ch. 430.)

4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, 4; 1939, 4; 1924, 4; 1922, ch. 390, 4.)

5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, 5; 1924, 5; 1939, 5; 1924, 5; 1922, ch. 390, 5.)

6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) Board to examine, approve or disapprove films.—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) What films considered obscene.—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) What films tend to debase or corrupt morals.—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) What films tend to incite to crime.—For the purposes of this article, a motion picture film or view

shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. (An. Code. 1951, 6; 1939, 6; 1924, 6; 1922, ch. 390, 6; 1955, ch. 201.)

7. Certificate of approval or license.

Upon each film that has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. ....." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statements shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar

statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by 11 of this article, to issue a duplicate certificate of approval. Any certificate or licensee issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, 7; 1939, 7; 1924, 7; 1922, ch. 390, 7; 1929, ch. 555, 7.)

8. Record of Examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, 8; 1939, 8; 1924, 8; 1922, ch. 390, 8.)

9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, 9; 1939, 9; 1924, 9; 1922, ch. 390, 9; 1945, ch. 66.)

10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall annually give corporate surety bond to the State of Maryland in such sum as the State Comptroller may prescribe, with condition that he faithfully perform the duties of his office and account for all funds received under color of his office. (An. Code. 1951, 10; 1939, 10; 1924, 10; 1922, ch. 390, 10; 1927, ch. 46; 1945, ch. 400.)

11. Fees.

For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages

sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of one dollar and twenty-five cents ($1.25) for the approval of every duplicate of one thousand feet (1,000′) or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of two dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of one dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of 7 of this article; and the Board shall account for any pay all fees received by it into the State treasury. (An. Code, 1951, 11; 1939, 11; 1924, 11; 1922, ch. 390, 11; 1929, ch. 555, 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720.)

12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City of Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of

the members of the Board, each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, 12; 1939, 12; 1924, 12; 1922, ch. 390, 12; 1941, ch. 727; 1947, ch. 257; 1960, ch. 47.)

13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, 13; 1939, 13; 1924, 13; 1922, ch. 390, 13.)

14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to prevent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, 14; 1939, 14; 1924, 14; 1922, ch. 390, 14.)

15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with

any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such potser, banner, or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, 15; 1939, 15; 1924, 15; 1922, ch. 390, 15.)

16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, 16; 1939, 16; 1924, 16; 1922, ch. 390, 16.)

17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make

any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, 17; 1939, 17; 1924, 17; 1922, ch. 390, 17.)

18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employe of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, 18; 1939, 18; 1924, 18; 1922, ch. 390, 18.)

19. Notice of elimination or disapproval; re-examination; appeals.

If any elimination or disapproval of a film or view is ordered by the Board, the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of

appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals. (An. Code, 1951, 19; 1939, 19; 1924, 19; 1922, ch. 390, 19; 1955, ch. 201.)

20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, 20; 1939, 20; 1924, 20; 1922, ch. 390, 20.)

21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by 7 hereof or any similar certificate,

statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, 21; 1939, 21; 1924, 21; 1922, ch. 390, 20A.)

22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approved seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, 22; 1939, 22; 1924, 22; 1922, ch. 390, 21.)

23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, 23; 1939, 23; 1924, 23; 1922, ch. 390, 22.)

24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, 24; 1939, 24; 1924, 24; 1922, ch. 30, 23.)

25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract

when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, 25; 1939, 25; 1924, 25; 1922, ch. 477.)

26. Same—Waiver.

No waiver of the provisions of 25 shall be made so as to evade the provisions of said 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, 26; 1939, 26; 1924, 26; 1922, ch. 477.)

Appendix B

CRIMINAL COURT OF BALTIMORE

MEMORANDUM OPINION

(Filed May 24, 1963)

SODARO, J.

The defendant is charged under indictment with violation of Article 66A Section 2 of the Annotated Code of Maryland, which reads as follows:

"Moving Pictures.

Sec. 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit, or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

The facts are not in dispute in that the defendant on November 1, 1962, did publicly show a certain motion picture entitled "Revenge at Daybreak", at the Rex Theatre in Baltimore City, without having previously submitted the film for licensing and approval by the State Board of Censors.

The defendant contends that Article 66A, upon its face, violates the First and Fourteenth Amendments of the United States Constitution in that it imposes an invalid infringement upon the exercise of the right of free speech and press; that it is invalid as con-

trary to the Due Process Clause of the Fourteenth Amendment, specifically in that the standards pursuant to which speech is abridged, set forth in Section 6 of said Article, are vague and that the standards fail to advise the defendant of those forms of speech which the State purportedly proscribes; that Article 66A, upon its face, violates Article 40 of the Maryland Declaration of Rights and is specifically contrary to the Due Process Clause of Article 23 of the Declaration of Rights of Maryland in that the standards contained in Section 6 of said Article, which permit the depriving of defendant's life, liberty or property, are couched in vague language which fail to apprise the defendant of the conduct the standard seeks to proscribe; that said Article is invalid as contrary to, and imposes an unlawful infringement upon the Interstate Commerce Clause of the United States Constitution, and specifically that it imposes a tax and/or license fee upon the right of the freedom of speech and press; that it is invalid and void in that it is an unlawful and illegal delegation of legislative authority to an administrative agency.

These grounds of attack collectively simply challenge the Censor's basic authority and do not go to any statutory standards or procedural requirements as to the submission of the film. It is not the contention of the State that the film in question violates any of the standards set out in the Statute.

After consideration of argument of counsel and briefs which were filed by both sides, I have concluded that Article 66a, and in particular Section 2 thereof which is the basis of the charge, is valid and constitutional. Although this challenged Section imposes a

previous restraint, the ambit of constitutional protection does not include complete and absolute freedom to exhibit any and every kind of motion-picture and this challenged provision, requiring the submission of films prior to their public exhibition, is not, on the grounds set forth by the Defendant, void on its face.

The defendant's broadside attack on the constitutionality of this Section is similar to that made in the case of Times Film Corporation v. City of Chicago, Et Al, 365 U.S. 43, in which Mr. Justice Clark, speaking for the majority court, said "Certainly, petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other exceptional cases mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances."

Consequently, the Defendant's Motion for Judgment of Acquittal is hereby denied.

Appendix C

IN THE COURT OF APPEALS OF MARYLAND

No. 144

September Term, 1963

RONALD L. FREEDMAN

v.

STATE OF MARYLAND

Henderson
Hammond
Prescott
Marbury
Sybert,
JJ.

OPINION BY SYBERT, J.

Filed: February 10, 1964

In order to test the constitutionality of the Maryland motion picture censorship statute, the appellant invited arrest by exhibiting the motion picture film "Revenge at Daybreak" at a theatre in Baltimore City without first having submitted the film to the Maryland State Board of Motion Picture Censors for approval and licensing, as required by Code (1957), Art. 66A, Sec. 2.[1] He was indicted and tried in the

[1] "§2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

Criminal Court of Baltimore for violation of Sec. 2, and convicted after his timely motions for judgment of acquittal were denied. He now appeals.

The appellant has attempted, both in the court below and on this appeal, to attack the constitutionality of Art. 66A in its entirety, even though he was tried and convicted only for violation of Sec. 2. The principal contention is that the statute is void on its face as an unconstitutional infringement upon free speech and press violative of the First Amendment to the United States Constitution (made applicable to the States under the Fourteenth Amendment) and of Art. 40 of the Maryland Declaration of Rights. The appellant then argues that in the defense of a criminal prosecution under Sec. 2 of Art. 66A he is entitled to challenge the constitutionality of the entire statute "since he is charged with a violation under the Act." Acting upon that premise, he proceeds to attack separately what he asserts are constitutional infirmities of certain features of the Act. His claims are that the Act fails to provide adequate procedural safeguards (although he noted that Sec. 19 of Art. 66A affords an appeal to the Baltimore City Court and thence to this Court); that the standards established by Sec. 6[2] of the Act are vague and hence

[2] §6. (a) *Board to examine, approve or disapprove films.*—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. • • •

"(b) *What films considered obscene.*—For the purpose of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

invalid as construed and applied; that the statute deprives him of equal protection of the law in that newsreels and noncommercial exhibitors such as educational, charitable, fraternal and religious organizations are excluded from the operation of the Act; and that the fee charged for the inspection and licensing of a film constitutes an invalid tax upon the exercise of freedom of speech.

The State maintained below and here that the statute is not void on its face, and that since the appellant did not submit his film to the Board for approval and licensing he lacks standing to challenge any provision or requirement of Art. 66A, except the provisions of Sec. 2, for violation of which he was convicted. The trial court agreed with the position of the State. Parenthetically, it is noted that neither the appellant nor the State even suggests that the film "Revenge at Daybreak" would violate any of the standards set out in the statute, and the State conceded that it would have been approved had it been submitted for licensing.

"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

We shall first consider the appellant's main attack —that the Maryland statute is void on its face as an unconstitutional prior restraint imposed upon the freedoms of speech and press protected against State action by the First and Fourteenth Amendments and by Art. 40 of the Maryland Declaration of Rights.

The Supreme Court of the United States, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 96 L.Ed. 1098 (1952), held that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, affords to speech and the press, and struck down the use of "sacrilegious" as a permissible censorship standard. However, the Court intimated that some form of censorship might be permissible when it said (at p. 502 of 343 U.S.): "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas." The Court further stated (*ibid.*) in considering the argument that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression: "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." Subsequent to *Burstyn*, a number of film censorship cases reached the Supreme Court which involved questions of standards. The films in those cases had all been submitted to the appropriate au-

thorities and permits for their exhibition were refused because of their content. Thus those cases are not apposite here and will not be reviewed.

In 1961, in *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 5 L.Ed. 2d 403, the question whether or not the constitutional guaranty of freedom of speech and of the press was violated by prior censorship was placed squarely before the Supreme Court. The appellant in that case, a motion picture exhibitor, challenged the validity of an ordinance of the City of Chicago which, as a prerequisite to public exhibition, required the submission of films to a censor. The exhibitor applied for a permit and tendered the license fee, as required by the ordinance, but refused to submit the film for examination. The permit was denied solely because of the refusal to submit the film. The exhibitor sought injunctive relief, challenging the ordinance on the ground that the First Amendment guaranties were violated by the prior censorship requirement, thus rendering the ordinance void on its face. The Supreme Court found that the attack was an attempt to have the Court hold that the public exhibition of motion pictures must be permitted under any circumstances, and that previous restraint cannot be justified regardless of the capacity of motion pictures for evil, or the extent thereof. In rejecting that contention, the Court said (pp. 49-50 of 365 U.S.):

> "With this we cannot agree. We recognize in *Burstyn, supra,* that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,'

> we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that —aside from any consideration of the other 'exceptional cases' mentioned in our decisions —the State is stripped of all constitutional power to prevent in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

In affirming the dismissal of the exhibitor's complaint, the Supreme Court held that the requirement of Chicago's ordinance for submission of films prior to their public exhibition was not void on its face as an invasion of the constitutional guaranties.

The Supreme Court's refusal to strike down all prior censorship of motion pictures was recognized and restated last year in *Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 9 L.Ed. 2d 584 (1963). In that case the court found unconstitutional a Rhode Island agency formed to screen books and magazines and to recommend the prosecution of violators of appropriate statutes, on the ground that the Act creating the agency did not require proper judicial superintendence. However, the court said, in Footnote 10 of *Bantam* (at p. 70 of 372 U.S.):

> "Nothing in the Court's opinion in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, is incon-

> sistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional *per se,* the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures." (Emphasis by Court.)

We conclude that on the authority of the *Times Film* case, *supra,* the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments. However, the appellant also argues that the statute is in conflict with Art. 40 of the Maryland Declaration of Rights, which provides:

> "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

We find no merit in this argument. The right to speak and print, protected by Art. 40, is not absolute. This Court has held that the liberty of the press does not include the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will. *Ex Parte Sturm,* 152 Md. 114, 120, 136 Atl. 312 (1927). The guaranty of freedom of speech and press ordained in

Art. 40 would appear to be, in legal effect, substantially similar to that enunciated in the First Amendment, and it is significant that Art. 40 has been treated by this Court as in *pari materia* with the First Amendment. See, for example, *Police Comm'r* v. *Siegel, etc., Inc.*, 223 Md. 110, 128, 162 A. 2d 727 (1960); *Baltimore* v. *A. S. Abell Co.*, 218 Md. 273, 289, 145 A. 2d 111 (1958). We therefore see no reason why Art. 40 should be interpreted differently from the First Amendment.

We think the State is correct in its contention that since the appellant chose to mount his attack on the constitutionality of motion picture censorship in Maryland by refusing to submit his film to the Board as required by Sec. 2 of Art. 66A (for which alone he was indicted), he has restricted himself to an attack on that section alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute. The appellant's contention that the entire Act is subject to challange when the State seeks a criminal conviction for failure to comply with a single provision of it is untenable. The indictment did not involve procedures or standards under other sections of the Act, or any of the other matters sought to be raised by the appellant, and thus there was no ripe and justiciable issue as to such matters before the trial court, and there is none before us. Other avenues—such as an action for injunctive or declaratory relief—are open to the appellant for the determination of such issues when he is faced with invasion of his rights.

In *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950), Judge Henderson, for the Court, reviewed the authorities dealing with the matter of standing to seek a judicial determination of a constitutional question in advance of the necessity for its decision. He pointed out that the Supreme Court, in *Federation of Labor* v. *McAdory,* 325 U.S. 450, 89 L.Ed. 1725 (1945), dismissed the writ of *certiorari* which it had issued in a case brought in the Alabama State court against enforcement officers for a declaratory judgment adjudicating the constitutionality of an Alabama Act which, it was contended, violated rights of free speech, due process and equal protection, and was vague and indefinite, and he quoted Chief Justice Stone as saying, " * * * this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' " To the same effect are *Hitchcock* v. *Kloman,* 196 Md. 351, 76 A. 2d 582 (1950); *Tanner* v. *McKeldin,* 202 Md. 569, 580, 97 A. 2d 449 (1953); *Givner* v. *Cohen,* 208 Md. 23, 37, 116 A. 2d 357 (1955), and *Dutton* v. *Tawes,* 225 Md. 484, 171 A. 2d 688 (1961), app. dism. 368 U.S. 345, 7 L.Ed. 2d 342, in the last of which cases Judge Hammond, for the Court, said (at p. 501 of 225 Md.): "In the view we take of the case, however, we think appellants are not entitled to have a declaration as to the constitutionality of the compact in operation. They have not shown that they are engaged in or faced with actual controversy, or that the issues are ripe and justiciable, so as to be able to call upon the courts to exercise the declaratory process. * * *" For the latest case in which this

Court has had occasion to consider the question of standing to raise issues, see *Citizens Comm. v. Anne Arundel Co.*, No. 135, this Term, Md. , A. 2d (1964).

The appellant relies strongly upon the cases of *Staub* v. *Baxley*, 355 U.S. 313, 2 L.Ed. 2d 302 (1958), and *Lovell* v. *Griffin*, 303 U.S. 444, 82 L.Ed. 949 (1938), to support his claim that he has standing to attack provisions of the Act other than Sec. 2. However, these cases are distinguishable. In each, the Supreme Court expressly found that the ordinance involved was void *on its face*, whereas the Chicago ordinance, substantially similar to the Maryland statute, was held not to be void on its face in *Times Film, supra.*

We hold that the requirement of Art. 66A, Sec. 2, that films be submitted to the Censor Board for approval and licensing before public exhibition, is not void on its face and is valid and enforceable. We also hold that, in this case, the appellant had no standing to question other portions of the statute.

JUDGMENT AFFIRMED; APPELLANT TO PAY COSTS.